STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 21, 2005
v	No. 253617 Oakland Circuit Court
JAMES ONIE MULLINS, Defendant-Appellant.	LC No. 2003-188854-FC

Before: Saad, P.J., and Fitzgerald and Smolenski, JJ.

PER CURIAM.

A jury convicted defendant of first-degree murder, MCL 750.316, felon in possession of a firearm, MCL 750.224f, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to life imprisonment for the first-degree murder conviction and to a concurrent term of two to seven years' imprisonment for the felon in possession conviction, to be served consecutive to two concurrent two-year terms for the felony-firearm convictions. Defendant appeals as of right. We affirm.

Defendant was convicted of fatally shooting the eighty-two-year-old victim, Cerafin Velez, who was shot once in the head and once in the neck with a shotgun. Each wound was itself fatal. Defendant initially told the police that he shot the victim when the victim went into defendant's bedroom to retrieve a fan out of the window. Defendant and the victim had been arguing about money and, when the victim went into defendant's bedroom, defendant obtained a sawed-off shotgun from his chair in the living room and followed the victim. He then shot the victim in the back. After the victim fell to the ground and started making noise, defendant shot him a second time to quiet him. Physical evidence indicated that the victim was more than three feet away at the time of both shots and that the victim was on the ground when he was shot.

At trial, defendant claimed that he acted in self-defense. While he admitted giving his prior statements to the police, he offered a substantially different version of events at trial. He denied that he shot the victim over a fan. He claimed that he was in his bedroom when the victim entered with a knife. According to defendant, the victim was angry about money and the fact that defendant had drank his beer. According to defendant, the victim threatened his life and jabbed the knife at him. Defendant said he grabbed a shotgun from his nightstand and, when the victim turned, he shot the victim in the back. Defendant claimed that the victim would have gotten the gun if defendant did not shoot him. Defendant testified that he was scared for his life and feared great bodily harm, and it was his only opportunity to shoot the victim. After the

shooting, defendant went to a friend's house where he later partied. Two days after the shooting, the victim's body was discovered in defendant's bedroom.

Defendant first argues that the prosecutor committed misconduct by repeatedly referring to defendant as a liar during closing argument. Because defendant did not object to the prosecutor's remarks at trial, we review this issue for plain error. *People v Aldrich,* 246 Mich App 101, 110; 631 NW2d 67 (2001).

Defendant does not cite the particular portions of the closing argument to which he takes exception. Nevertheless, a review of the prosecutor's closing argument in its entirety reveals that on numerous occasions the prosecutor referred to defendant as a liar or characterized his testimony as lies. However, we do not find plain error requiring reversal.

Generally, "[p]rosecutors are accorded great latitude regarding their arguments and conduct." They are "free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case." *People v Bahoda,* 448 Mich 261, 282; 531 NW2d 659 (1995) (citations omitted). A prosecutor is not required to state inferences or conclusions in the blandest terms possible. *People v Launsburry,* 217 Mich App 358, 361; 551 NW2d 460 (1996). Rather, prosecutors may use "hard language" when it is supported by the evidence and are not required to phrase arguments in the blandest of all possible terms. Emotional language may be used during closing argument and is "an important weapon in counsel's forensic arsenal." *People v Ullah,* 216 Mich App 669, 678-679; 550 NW2d 568 (1996). Further, a prosecutor may argue from the facts that the defendant is not worthy of belief. *People v Howard,* 226 Mich App 528, 548; 575 NW2d 16 (1997). She may even characterize the defendant as a "liar," if the comment is based on the evidence produced at trial. *Id.* A prosecutor may also appeal to the jury's common sense when arguing that the circumstances surrounding certain testimony render the testimony believable or not believable. See, e.g., *People v Fisher,* 220 Mich App 133, 160; 559 NW2d 318 (1996); see also *People v Lawton,* 196 Mich App 341, 355; 492 NW2d 810 (1992).

With the exception of one comment, the prosecutor's comments were not improper. One of the witnesses testified, without objection, that defendant was not a truthful person. Moreover, there was no question that defendant had lied. He either lied when he gave his statements to the police or he lied at trial. His trial testimony contradicted his statements to the police in significant ways. The prosecutor referred to defendant as a "liar" and accused him of lying in the context of comparing his police statements and trial testimony, revealing the differences between the two, and calling on the jury to use its common sense when considering why defendant changed his story and how a reasonable person would have acted when interviewed by the police. These comments, based on the evidence, inferences, and common sense, were appropriate.

But the prosecutor's comment that she was entitled to call defendant a liar because he had the nerve to come into court and lie about what he did overstepped the bounds of propriety. The comment was not related to the evidence and was not an appeal to the common sense of the jury. Nevertheless, this isolated comment does not warrant reversal. The jury was instructed that the arguments of the parties are not evidence. Juries are presumed to follow their instructions. *People v Graves,* 458 Mich 476, 486; 581 NW2d 229 (1998). Moreover, defendant cannot demonstrate that the comment affected the outcome of the lower court proceedings in this case

where the evidence against him was overwhelming. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Additionally, it is settled that "a well-tried, vigorously argued case should not be overturned on the basis of a few isolated improper remarks that could have been corrected had an objection been lodged." *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998).

Defendant next argues that the prosecutor committed misconduct during closing argument when she implied that defense counsel had coached defendant before he testified. This argument is not preserved because the challenged argument was not met with an objection at trial. We therefore review this issue for plain error. *Aldrich, supra.* The prosecutor argued that defendant never used the words "great bodily harm" until he was on the witness stand. She noted that those words are used in the self-defense jury instruction, and pondered where defendant learned those words. "A prosecutor cannot personally attack the defendant's trial attorney." *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996). She also may not assert or imply that defense counsel is trying to mislead the jury. *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001). In this case, however, the prosecutor did not mention defense counsel or personally attack him. She also did not suggest that counsel was trying to mislead the jury. Rather, she pointed out that defendant provided a different version of events at trial and used a legal term that is included in the definition of self-defense, which was the defense he was trying to establish. The prosecutor's argument was a common sense argument that defendant had studied the elements of his defense and was using specific language to try and convince the jury of that defense. It was a common sense argument that defendant should not be believed. A prosecutor may argue from the facts that a defendant is not worthy of belief. *Howard, supra.* She may also appeal to the juror's common sense. *Fisher, supra*; *Lawton, supra.* Accordingly, the challenged comment does not constitute plain error requiring reversal. *Aldrich, supra.*

Finally, defendant argues that the trial court erred when it denied his request for an instruction on voluntary manslaughter. We review claims of instructional error de novo. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). A harmless error analysis also applies to claims of instructional error involving necessarily included lesser offenses. *People v Cornell*, 466 Mich 335, 361-362; 646 NW2d 127 (2002). Voluntary manslaughter is a necessarily included lesser offense of first-degree murder. *People v Mendoza*, 468 Mich 527, 541; 664 NW2d 685 (2003). When a defendant is charged with murder, an instruction for voluntary manslaughter must be given if supported by a rational view of the evidence. *Id.*

To establish voluntary manslaughter, there must be evidence that the defendant killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control his passions. *Mendoza, supra* at 535, citing *People v Pouncey*, 437 Mich 382, 389; 471 NW2d 346 (1991). Provocation is a circumstance that negates the presence of malice. *Mendoza, supra* at 536. In *Pouncey, supra* at 392-393, the Court indicated that the "[k]ey to any finding of voluntary manslaughter is evidence of adequate provocation that a reasonable factfinder could conclude that the defendant, overcome by emotion, could not choose to refrain from the crime."

In this case, a rational view of the evidence does not support that defendant killed in the heat of passion, that there was adequate provocation, or that he could not control himself.[1] The argument that precipitated defendant's actions involved money. Defendant admitted at trial that he owed the victim money and that the victim was angry about money on the day of the shooting. The physical evidence indicated that the victim was more than three feet away from defendant at the time he was shot in the back. There was no question that defendant knew what he was doing when he fired both shots. He testified that he fired the first shot at the victim's back because it was his only opportunity to do so. He claimed that, if he did not do it at that time, the victim could have taken the gun. The physical evidence also indicated that the victim was on the ground at the time of the second shot. Regardless of whether the victim was on the ground, as defendant stated to police, or struggling to stand, as defendant stated at trial, it was undisputed that defendant observed the victim after he fell, aimed at him, and deliberately fired the second shot. While defendant testified that he felt threatened for his life when he fired the shotgun, nothing in the record supported that defendant was so overcome by emotion that he could not refrain from the shooting. Further, defendant told the police that the victim was always "walking around with a knife in his hand" or "sharpening one." Defendant did not make a different claim at trial. Thus, even if the jury believed that the victim entered defendant's room with a knife and was yelling the scenario was apparently not unusual to either defendant or the victim. Because a rational view of the evidence did not support the voluntary manslaughter instruction, it was not error for the trial court to refuse to provide that instruction.

Although we conclude that the trial court did not err in rejecting defendant's request for a voluntary manslaughter instruction, we nevertheless note that the jury rejected the lesser offense of second-degree murder in this case. Where a court fails to instruct on voluntary manslaughter and a defendant is convicted of first-degree murder, any instructional error is harmless if the jury rejects other lesser offenses, including second-degree murder. *People v Sullivan*, 231 Mich App 510, 520; 586 NW2d 578 (1998). Thus, even if there was an error, it was harmless.

Affirmed.

/s/ Henry William Saad
/s/ E. Thomas Fitzgerald
/s/ Michael R. Smolenski

[1] Defendant claims on appeal that issues of past abuse and the past rape of defendant's sisters contributed to the existence of provocation. This argument is without merit. At no time did defendant testify or imply that past abuse or the alleged rape of his sisters factored into the shooting. Further, any past abuse or alleged rape was in the very distant past. Thus, defendant would have had ample time to control his passions related to those incidents even if they were identified as factors precipitating the shooting. The gap in time negates that those matters supported provocation. *Mendoza, supra* at 535.